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# NOTES.

TRIAL BY JURY FOR PETTY OFFENCES.—The Constitution of the United States provides that "the trial of all crimes, except in cases of impeachment, shall be by jury." Art. III § 2 (3). The provision is not expressly restricted as to the grade of crimes to which it applies, and on its face, appears to be absolute, with the single mentioned exception. The federal Supreme Court has, however, recently held that the provision does not apply to petty offences. *Schick* v. *U. S.* (1904) 195 U. S. 65. The plaintiff in error in this case was prosecuted for receiving for sale oleomargerine not stamped according to law. He was tried without a jury and the court imposed the statutory penalty of $50.00. The Supreme Court, in considering the effect of the Constitutional provision, pointed out that in the original draft of a constitution in the Convention of 1787 the provision was for the trial of "all criminal offences" by jury, saying that the substitution of the expression "all crimes" for that of "all criminal offences" showed an intention to restrict the operation of the provision to grave offences, and quoted the passage from Blackstone where he says that crimes and misdemeanors are violations of public law and are properly mere synonymous terms, but that in common usage graver offences only are called crimes, and lighter ones, misdemeanors. The court ascribes to the framers of the Constitution an intention to use the word "crime" in its vague popular meaning; but it would seem more likely that a body of lawyers, making use of the standard legal text-book of the day, in establishing the supreme law of the land, would adopt the meaning therein declared to be the proper one.

Art. XI § 4, in the draft of a constitution submitted to the convention by its committee provided for the trial of all criminal offences in the State where committed and by jury. This was unanimously amended to read in substantially its present form, the arrangement of the section being changed, provision made for crimes not committed in any State, and the expression "all criminal offences" changed to

"all crimes." MADISON says of the change: "The object of this amendment was, to provide for a trial by jury of offences committed out of any State." Madison Papers, Vol. III, p. 1441. MADISON's failure when stating one reason for the change to mention any such significance in it as the court finds, and particularly his use of the rejected word "offences," would indicate that there was no deliberate change of the kind suggested by the court. HAMILTON, in the Federalist, too, says that all "criminal causes" are triable by jury. No. 83. Several passages in the Constitution indicate that when the operation of a provision is meant to be restricted to offences of a certain gravity, such an intention is clearly shown. In providing for the jurisdiction of federal courts, the expression "felonies on the high seas" is used, Art. I. § 8 (10); in providing for indictment, "capital or otherwise infamous crime," Amend. V; in defining the grounds for impeachment, "treason, bribery, or other high crimes and misdemeanors." Art. II. § 4. In providing for extradition, the Constitution mentions "treason, felony, or other crime." Art. IV § 2 (2). In *Kentucky* v. *Dennison* (1860) 24 How. 66, TANEY, C. J., speaking for the court, declared that the use of the word "crime" in this clause, instead of the expression "high misdemeanor," as in the Articles of Confederation, showed "the deliberate purpose to include every offence known to the law of the State from which the party charged had fled."

In England many criminal offences, particularly minor ones were punished summarily without the intervention of a jury at the time of the adoption of the Constitution, but these summary convictions were not the result of any principles of the common law, but of Acts of Parliament authorizing the trial of particular offences in that manner. Blackstone, Bk. 4, p. 280. This practice was declared by BURN in his "Justice," the eleventh edition of which appeared in 1770, to be a "tacit repeal of that famous clause in the Great Charter, that a man shall be tried by his equals," Vol. I, p. 373, and BLACKSTONE protested against it as "threatening the disuse of our admirable and truly English trial by jury, unless only in capital cases." Bk. IV, p. 281. In view of these strong expressions by writers conceded to have had a great influence on the members of the Constitutional Convention, it seems unlikely that the Convention intended to perpetuate the practice prevailing in England by the use of the simple expression "the trial of all crimes shall be by jury." Nor does it seem that the Supreme Court has followed the English system. In *Callan* v. *Wilson* (1888) 127 U. S. 540, the petitioner was tried summarily, convicted and sentenced to pay $25.00, or in default thereof, to thirty days imprisonment. The offence was conspiracy to prevent a certain person from pursuing his lawful calling. The court declared the petitioner entitled to a jury trial, though in *Rex* v. *Vipont* (1761) 2 Burr. 1163, on facts strikingly similar, the defendant was summarily convicted by the English court. A comparison of the principal case and *Callan* v. *Wilson* shows a disposition on the part of the Supreme Court to treat the kind of punishment, whether imprisonment or money penalty, as an important, and perhaps the determining factor, though it is doubtful whether or not the court would make this an invariable test.

The clause in the federal Constitution is conceded to refer only to the federal courts, *Eilenbecker* v. *District Court* (1889) 134 U. S. 31, but jury trial is provided for in all the State constitutions. In many, perhaps a majority, the provision is for the preservation of trial by jury. Under such a provision, a summary conviction valid before the adoption of the constitution would of course still be valid. *Byers* v. *Comm.* (1862) 42 Pa. St. 89. In construing clauses similar to the federal provision, however, the cases are not uniform. Many hold as in the principal case, Ex parte *Marx* (1889) 86 Va. 40; *State* v. *Conlin* (1855) 27 Vt. 318, while some reach the opposite result. In re *Rolfs* (1883) 30 Kans. 758; *Belatti* v. *Pierce* (1896) 8 S. D. 456. In *Callan* v. *Wilson* supra, is a dictum that there are cases where jury trial is not required by the federal Constitution, but while on the Kansas bench, BREWER, J., pointed out the importance of the distinction between a provision preserving trial by jury and one requiring all crimes to be tried by jury. In re *Rolfs*, supra. The distinction seems well taken, and it applies with still stronger force to the case of the federal Constitution in view of the condemnation of the practice of summary convictions pronounced by influential legal writers of the time of its adoption.

The courts have been much pressed by practical considerations. The very great inconvenience of requiring trial by jury for trivial offences and the long acquiescence in summary convictions and the consequent "revolution," as it is termed by several courts, which would follow a declaration of a universal right of trial by jury, are considerations of very great weight, and it is these considerations which are perhaps a warrant for the result reached in the principal case. There are, however, practical objections to the rule of the principal case, for there is no definite line between the cases there declared triable by jury and those not necessarily so triable, and instead of a uniform rule for all cases, there are substituted two rules, the extent of the application of which is and necessarily must remain more or less uncertain.

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DOUBLE TAXATION BY COMPETING AUTHORITIES.—While the ancient principle that political allegiance formed the basis of the individual's fiscal obligation to the government has generally been abandoned, the States are not always in harmony as to what principle shall supersede it. Two views are constantly conflicting: one that the owner's domicile shall determine the government to which the obligation is due; and the other that the location of the property shall be the test. Without exception the latter, the so-called rule of situs, is applied to real estate, and the property is taxed where located. With regard to personalty, however, many of the States have adopted a rule of the common law, mobilia sequuntur personam, as an expression of the principle, and the property is taxed at the domicile of the owner. Story, Conflict of Laws, 8th ed., §§ 362, 383. 550. Many of the States have even here applied the rule of situs, some by statute, Ind. Rev. Stat. sec. 6287; and some by judicial interpretation, *Hoyt* v. *Comm.* (1861) 23 N. Y. 224. It is clear that neither principle applied to the exclusion of the other is entirely satisfactory from an economic standpoint. Seligman, Essays in Taxation, p. 110. A resident of a State who derives his entire income from without the State certainly